

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

TE-TA-MA TRUTH FOUNDATION --
FAMILY OR URI, INC.

Plaintiff,

v.

THE WORLD CHURCH OF THE CREATOR

Defendant.

Case No. 00 C 2638

Judge Joan Humphrey Lefkow

**PLAINTIFF'S MOTION TO DECLARE THIS CASE EXCEPTIONAL AND AWARD
PLAINTIFF'S ATTORNEYS' FEES**

FILED
AUG 28 2002
MICHAEL W. DOBBINS
U.S. DISTRICT COURT

James M. Amend, P.C.
Paul R. Steadman
Kevin J. O'Shea
Jami Jarosch

Attorneys for Plaintiff

88

Defendant World Church adopted an explicit litigation tactic of encouraging its members to harass and threaten both the Plaintiff Foundation and the attorneys representing it. For example, the World Church urged its members to deliberately tie up phone lines and email storage space, and to make threats against the Foundation's employees and its attorneys. The World Church's members, thus incited, have in fact harassed and threatened the Foundation and its counsel, as detailed below. Such litigation misconduct is certainly "exceptional" and "oppressive" and warrants the imposition of attorneys' fees under 15 U.S.C. § 1117(a).

I. THE WORLD CHURCH'S ACTIONS IN THIS LITIGATION ARE EXCEPTIONAL

A. The World Church's actions following the filing of the lawsuit

This lawsuit was filed on May 2, 2000. At that time, emails began arriving at the Foundation from World Church members. Some of the emails asked the Foundation to reconsider its decision to sue. Some of the emails were rude and offensive, but not threatening. Others, however, were much less innocent:

- "We will include you in the concentration camps..." (Tab 13).¹
- "Perhaps I will drop by and pay you a visit. TOM METZGER." (Tab 10). (While we cannot verify the actual identity of the sender of this email, Tom Metzger is the name of the director of White Aryan Resistance.)
- "[I]f you are wise you will stop such a stupid action as a lawsuite [sic], for your well-being." (Tab 16).
- "i and my racial comrades take a great offense in suing the real church of the creator . . . you wander why Hitler took you Jewish scum out back then well i hope you realize this will piss my race off even more because of this there

¹ For the Court's convenience, each of the exhibits to this motion have been consolidated with the exhibits to the Motion for Preliminary Injunction filed herewith, and filed in a separate binder. Tab references herein refer to that binder.

may be a rise in so called 'Hate Crimes' i am not saying i am going to but your sure to piss somebody off to the point of violence" (all grammar and spelling in original) (Tab 5).

- "I'll tell you what your going to do is piss off allot of my aryan brothers and sisters!" (Tab 9).

B. The World Church's actions following the filing of the Notice of Appeal.

The threats and harassment by the Defendant and its members did not stop after the Complaint was filed. On February 15, 2002, the Foundation, through its attorneys, filed a notice of appeal from this Court's Order granting summary judgment to the World Church. Mr. Matthew Hale, the Defendant's leader (*pontifus maximus*), responded by sending out an email and a hotline message calling on World Church members to "put pressure to bear on the [Foundation's] scoundrel law firm." (Copies attached at Tabs 1 and 80). See http://www.wcote.com/hotline/29_08.html. In the hotline message (Tab 80), which is posted on the infringing web site www.wcote.com, Mr. Hale urged World Church members:

- "In any case, I want you to try something new. I want you to begin lodging your protests with the law firm responsible for this attack. . . . I note that two of the three main attorneys from this firm handling the case are Jewish. The ringleader is named James Amend. Call Amend at (312) 861-[omitted, but contained in original] or send him a fax at (312) 861-2200. You have every right to protest this witch hunt and make them consume their time and money dealing with the mass of calls from angry White Racial Loyalists. They have consumed enough of our time and money--perhaps they could be repaid in kind."
- "This is not a case in which attorneys are simply representing the will and interests of their clients. This is a case of attorneys actually being the impetus and spearhead for the entire matter. Does Mr. Amend's Jewish background have anything to do with his actions? Two plus two usually does, in fact, equal four."

In direct response to these instructions from the World Church's leader, its members sent emails to the Foundation's attorneys. These emails stated:

- To the Attorneys: “I urge you to rescind from carrying this case on any further to avoid embarrassment to yourself and to your clients. . . .” (Tab 39)
- To the Attorneys: I understand that your law firm has appealed a decision handed down by a lower court in the World Church Of The Creator name lawsuit. . . . ***I’m a member of WCOTC*** and I just want to say that I think it's awful that your firm would do this kind of cheap, petty thing in the first place. WE had the name first. No one else did and it's been proven. Why do you and your firm place money ahead of ethics and morals? Obviously your client is paying a lot of money. Shame on your firm. God is watching you. (Tab 41)

The Foundation’s attorneys also began to receive harassing voice mail messages at this time, including overt death threats: “Listen up you Kike, you better leave our f[omitted] church alone or ***I’m gonna f[omitted] kill you.***” (Tab 74)

Apparently not satisfied with the harassment and threats the first email had engendered, on April, 18, 2002, the World Church issued a second hotline message urging members to continue calling the “Jew infested law firm, Kirkland & Ellis” and again gave the direct telephone line for one of the “Jewish attorney[s].” (Tab 81). Mr. Hale urged members to “continue calling Kirkland & Ellis and voice your opposition to their pursuing this appeal of their harassment lawsuit against us. Call Jewish attorney James Amend” and listed his phone number. See http://www.wcotc.com/hotline/29_16.html. (Tab 81)

C. The World Church’s actions following judgment on appeal.

On July 25, 2002, the Seventh Circuit issued its decision reversing the summary judgment granted to the World Church and ordering that judgment be entered in the Foundation’s favor. *Te-Ta-Ma Truth Foundation v. The World Church of the Creator*, 279 F.3d 662 (7th Cir. 2002). On July 29, 2002, the World Church issued a hotline message about the decision. Announcing that it would be ignored, it stated, “we will continue to use our name. . . . There is no power, there is no authority that can tell us, as a Church, that we must use a certain

name... We will not submit, we will not bow down before any unconstitutional decision; we don't care where it comes from." http://www.wcote.com/hotline/29_31.html (attached at Tab 82) The World Church called on its members to continue using the name of the World Church whenever they are spreading their beliefs, and then began to call for more email harassment of the Foundation and its attorneys by the World Church's members. (Tab 82)

On August 1, 2002, Mr. Hale followed up with another email message to World Church members, again calling on them to continue their protests against the "bogus pro-kike Church" and its attorneys. Hale listed the "website of the vermin" (the Foundation), its mailing address and email address. He also named the Foundation's individual attorneys, and listed their email addresses and Kirkland & Ellis' phone number. He again called on his members "to speak to any of these scoundrels and spend as much time as you desire taking them away from their mission..." (Tab 2).

A flurry of emails from World Church members followed. Some were sent repeatedly from the same people. Some were rude and offensive and others, as with the earlier round, were more threatening:

- To the Foundation: "The World Church of the creator has members in your area and who are on their way to talk to you about the lawsuit." (Tab 23).
- To the Foundation: "do us, the people concerned about the preservation of nature's finest, a favor. I'm sure we could supply you with the gun." (Tab 31).
- To the Foundation: "The only thing you will be successful in doing is EARNING THE WRATH OF THOUSANDS OF CREATORS!" (Tab 24).
- To the Foundation: "The World Church of the Creator has had our name for many years more than you. . . . you will make a lot of people very angry." (Tab 26).

- To the Foundation's Attorneys: "My name is Michael and I am a member of The WCOTC in East Peoria. I think it is absurd that a organization such as yourself . . . would battle for a name instead of allowing us to have the name our founder gave us." (Tab 63)
- To both the Foundation and its Attorneys: You must STOP your FASCIST ATTACK on our Church!! Protests and Boycotts are all you will get from us!!!!" (Tab 61)
- To the Foundation: "keep praying to your pathetic jew god that does not exist that you and all your 'brothers of humanity' will not suffer the same fate that you are destined to face" (Tab 35).
- To the Foundation: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." (Tab 28).
- To the Foundation's Attorneys, a voicemail stated "Yes, my name is John Pierce. I'm a member of the COTC, the Church of the Creator, the real Church of the Creator. Personally, I think you're a shyster, the ambulance chaser of the worse kind. How dare you persecute the Church of the Creator?" (Tab 75)

Like Hale's comments in his email and hotline messages, his members also declared their commitment to the continued use of the infringing marks in spite of the Seventh Circuit's judgment:

- Another voicemail to the Foundation's Attorneys stated "Yeah, *I'm a member ... of the WCOTC*, the real COTC, and I must say that I find your actions extremely offensive. . . . we don't care what that three judge court of clowns say, we have the right to our religion... We will not abide by any of the unconstitutional proclamations of your kangaroo court. 'To hell with you.'" (Tab 77).
- An email to the Foundation stated: "You can pay all the judges you want, hire all the expensive lawyers you want, pass all the crooked laws you want prohibiting us from using our name but none of it will work we will keep the name that our founder Ben Klassen gave us in 1972. No matter what!!!!" (Tab 35).
- Another voicemail stated "We will not abide by your distortions, your perversion of the Constitution." (Tab 75).

II. THE CASE IS EXCEPTIONAL UNDER 15 U.S.C. § 1117(A).

This Court has the power and authority to declare a case exceptional and award attorneys' fees. 15 U.S.C. § 1117(a) provides:

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

In the Seventh Circuit, "exceptional cases" are those involving "truly egregious, purposeful infringement, or other purposeful wrongdoing." *Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1159 (7th Cir. 1994). The Eighth Circuit has held cases exceptional where a party's actions were "groundless, unreasonable, vexatious, or pursued in bad faith...[or] one in which one party's behavior went beyond the pale of acceptable conduct." *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 863, 877 (8th Cir. 1994) (citations omitted). 35 U.S.C. § 285 of the Patent Act imposes precisely the same standard for an "exceptional case," and the Federal Circuit has explained that "exceptional circumstances" includes misconduct during litigation, bad faith, malice, harassing tactics, and other similar concepts. *See Bayer Aktiengesellschaft v. Duphar Int'l. Research B.V.*, 738 F.2d 1237, 1242 (Fed. Cir. 1984); *Rolls-Royce, Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1111 (Fed. Cir. 1986).

By using the term "equitable considerations," the Lanham Act invokes the tradition of equity, a hallmark of which is the ability to assess the totality of the circumstances in each case, including vexatious litigation conduct. *Securacomm Consulting, Inc. v. Securacom Inc.*, 224 F.3d 273, 281 (3rd Cir. 2000). Although culpable conduct of a defendant in the act of infringement is a relevant factor to consider, it is not exclusive of other equitable considerations. *Id.* This also includes bad faith actions by a party to the litigation. *Id.*; *Kloster Speedsteel AB v. Crucible Inc.*, 793 F.2d 1565, 1580 (Fed.Cir.1986) ("[B]ad-faith displayed in pretrial and trial stages, by counsel or party, may render the case exceptional"); *Yankee Candle Co., Inc. v.*

Bridgewater Candle Co., LLC, 140 F.Supp.2d 111, 121 (D. Mass. 2001) (predatory litigation strategies justifies exceptional case meriting a shift in fees).

The type of conduct that typically warrants “exceptional” status, and the award of attorneys’ fees, is that which is intended to deliberately waste the time and resources of the opposing party, is untruthful, or goes beyond the bounds of acceptable behavior. For example, in *Gorenstein Enterprises, Inc. v. Quality Care--USA, Inc.*, the defendants, whose franchise had been terminated by the plaintiff, continued to use the plaintiff’s trademark after they had lost on the merits of the trademark infringement action, on the ground that they were both permitted and required to continue using the plaintiff’s trademark during the pendency of the defendants’ own action to rescind the franchise. “So weak are [these arguments], and so deliberate the infringement, that it might have been an abuse of discretion for the district judge not to have awarded ... attorney’s fees.” 874 F.2d 431, 435 (7th Cir. 1989) (noting that defendants actually were holding the trademark hostage in order to pressure the plaintiff to settle the suit or renegotiate the franchise). *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 746 (7th Cir. 1985) (defendant’s “cavalier disregard of the objective truth” in its false advertising targeted at plaintiff warranted a finding that its related trademark infringement was an exceptional case). Under the Patent Act, Courts find exceptional iniquitable conduct during prosecution of a patent, misconduct during litigation, vexatious or unjustified litigation, or a frivolous suit. *Bayer*, 738 F.2d at 1242. Litigation misconduct includes such actions as denying in interrogatories that which the party knows to be true, *see, e.g., Hughes v. Novi American, Inc.*, 724 F.2d 122, 125 (Fed. Cir. 1984).

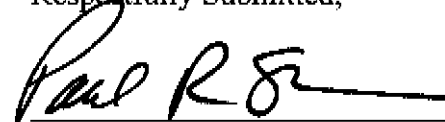
There is no doubt that this case merits being declared “exceptional,” in light of the World Church’s deliberate harassment and intimidation, purposeful wrongdoing connected with the

suit, and bad faith behavior beyond any standard of acceptable conduct. The World Church's behavior (and that of its leader and members) has gone beyond that which is normally considered "exceptional" (such as frivolous filings and requests), to something much worse. While exceptional cases usually deal with malice and vexatious conduct relating to pleadings, the malice and vexatious conduct in this case has had a similar effect, that of wasting time and attention of the attorneys with matters that have nothing to do with the case at issue. The World Church's conduct has reached the level of veiled and overt threats to the well-being of the Foundation's members and the attorneys who represent them. Indeed, the Foundation has received emails threatening violence and "visits" from members of the World Church's members, and its attorneys have received death threats. The World Church's only possible purpose for this sort of conduct was to intimidate or frighten the Foundation and its attorneys into dropping the lawsuit or the appeal.

Considering all the circumstances of the case, and applying traditional equitable considerations, including the Defendant's litigation conduct and outright coercion, this case certainly deserves to be declared "exceptional." The World Church has repeatedly and deliberately called on its members to harass and threaten the Foundation and its attorneys, telling its members it is their "duty" to do so. Its members complied. This behavior continued, and even escalated, after the behavior was revealed to the World Church's attorney. It was malicious and explicitly intended to sap the resources of the Foundation and intimidate its attorneys. By any standard, this is exceptional conduct, outside any boundary of acceptable behavior. As such, the Court should declare this case exceptional and award attorneys' fees to the Plaintiff.

Dated: 8/28, 2002

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Paul R. Steadman", written over a horizontal line.

James M. Amend, P.C.

Paul R. Steadman

Kevin J. O'Shea

Jami Jarosch

KIRKLAND & ELLIS

200 East Randolph Drive

Chicago, Illinois 60601

(312) 861-2000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 8/28, 2002, the foregoing Motion was served via Federal Express on the following counsel of record for Defendant The World Church of the Creator:

Todd Reardon, Esq.
A Citizens' Law Office
516 Monroe Street
Charleston, Illinois 61920

Date: 8/28/02

Todd R. S.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

TE-TA-MA TRUTH FOUNDATION --
FAMILY OF URI, INC.

Plaintiff,

v.

THE WORLD CHURCH OF THE CREATOR

Defendant.

FILED

AUG 28 2002

MICHAEL W. DOBBINS

Case No. 00 C 2638

Judge Joan Humphrey Lefkow

NOTICE OF MOTION

PLEASE TAKE NOTICE that on Sept. 5, 2002, at 9:30 a.m. or as soon thereafter as counsel may be heard, Plaintiff TE-TA-MA Truth Foundation -- Family of URI, Inc. will appear before the Honorable Judge Joan Humphrey Lefkow in room 1925 of the Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois 60604, and present the attached PLAINTIFF'S MOTION TO DECLARE THIS CASE EXCEPTIONAL AND AWARD PLAINTIFF'S ATTORNEYS' FEES.

Dated: 8/28, 2002

Respectfully Submitted,

James M. Amend, P.C.

Paul R. Steadman

Kevin J. O'Shea

Jami Jarosch

KIRKLAND & ELLIS

200 East Randolph Drive

Chicago, Illinois 60601

(312) 861-2000


88

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this Aug. 28, 2002, the foregoing Notice of Motion was served via Federal Express on the following counsel of record for Defendant The World Church of the Creator:

Todd Reardon, Esq.
A Citizens' Law Office
516 Monroe Street
Charleston, Illinois 61920

Date: 8/28/02

A handwritten signature in black ink, appearing to read "Todd Reardon", is written over a horizontal line.